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Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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No. 394

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THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Appellate Division (Third Department) of the Supreme Court of the State of New York is reported in 4 App. Div. 2d (N. Y.) 348, 165 N. Y. S. 2d 681 (R. 27-30).

The opinions of the Judges of the Court of Appeals of the State of New York are reported at 4 N. Y. 2d 349, 175 N. Y. S. 2d 39 (R. 30-55).

Statement of the Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(2).

The decree sought to be reviewed was made by the Court of Appeals of the State of New York on May 15, 1958, and judgment was entered thereon in the New York Supreme Court, Albany County, on July 2, 1958. The Notice of Appeal to the Supreme Court of the United States was filed

July 30, 1958 in the Supreme Court of the State of New York, Albany County.

Probable jurisdiction was noted November 24, 1958 (R. 62).

The Constitutional Provisions and Statutes Involved

The Constitution of the United States,

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Statutes Involved

New York Education Law §129 makes it unlawful to exhibit motion pictures in a public theater unless the pictures are licensed. Violation of the provision is a penal offense (Education Law §131). The required licenses are issued by the Motion Picture Division, a subdivision of the State Education Department (Education Law §§120, 122.)

Before a license is issued for a film, it must be reviewed by the Director or other officer of the Motion Picture Division. The reviewers are empowered and directed to deny a license to any film found "obscene, indecent, immoral, inhuman, sacrilegious, or * * * of such a character that its exhibition would tend to corrupt morals or incite to crime". (Education Law §122). Section 122-a of the Education Law provides that the term "immoral" as used in Education Law §122 refers to motion pictures or parts of motion pictures "the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

The texts of the statutes referred to and the volume and page where each may be found are set forth in the Appendix.

The Questions Presented for Review

(1) Whether Sections 122, 122-a, 126, 129 and 131 of the Education Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States by setting up a system of licensing and prior censorship of motion pictures.

(2) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York, in providing for suppression of films found to be immoral, authorize the suppression of opinion in violation of the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(3) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York are so vague and indefinite

that their attempted enforcement violated Appellant's property rights and civil rights without due process of law.

(4) Whether the ban of the Appellant's moving picture "Lady Chatterley's Lover" was unwarranted and unreasonable and unjustly deprived Appellant of its property rights and right of communication.

Summary of Argument

I. The New York motion picture censorship laws require that all films be approved and licensed by a government agency before they may be shown in a public theater. The laws create a system of prior restraints. Such restraints are repugnant to the Constitutional amendments guaranteeing freedom of the press. They impose more comprehensive and more stringent control and are more repressive in effect than laws imposing penal sanctions on publication deemed improper. There is no justification for excepting motion pictures from the general rule that the press shall not be subject to regulation before publication.

II. The picture "Lady Chatterley's Lover" was banned because its theme was considered immoral. The supposed immorality consisted of the presentation of adultery in such a manner as to indicate approval. We assume for the purposes of this argument that the film did in fact condone or approve adultery. However, a communication may not be suppressed for that reason. The right of expression includes the right to make statements and express opinions that are contrary to the moral principles of the community. The denial of the right to make such statements is a violation of the speech and press guaranties of the First and Fourteenth Amendments.

III. Sections 122 and 122-a of the New York Education Law, which authorize the denial of the right to exhibit a film found "immoral," are so vague and indefinite that each administrator of the law must determine its meaning for himself and, in its application, enforce his personal views or notions of morality. An adverse decision by the administrator of the law results in the loss of substantial rights: the right of expression by means of talking pictures, and the right to exhibit a film for profit. Since the vagueness of the statute permits arbitrary application, one may be deprived thereunder of rights without "due process" of law.

IV. The condemnation and suppression of the film "Lady Chatterley's Lover" was unwarranted and improper. The intent of the film was misconceived and its dominant theme, which is of social importance, was ignored. The Appellees and the court below also erred in refusing to consider the excellence of workmanship and the aesthetic values of the moving picture, factors which far outweighed the aspects that the Appellees considered objectionable. Where such affirmative values exist, the First and Fourteenth Amendments are violated by the refusal to permit a film to be shown publicly.

Statement of the Case

The subject of this appeal is the ban in New York of the film "Lady Chatterley's Lover." The Appellant is the Distributor of the picture and has the sole right to show it or to license its exhibition in the United States (R. 6). In May, 1953, the Distributor sought and was refused a license to show the picture in New York (R. 6-7). The application was made to the Motion Picture Division of the

Department of Education of the State of New York, which issues such licenses (New York Education Law, §122). Since the public exhibition of a motion picture in the State without a license is a penal offense (New York Education Law, §131), the refusal of a license prevented the public showing of the film in New York.

The motion picture "Lady Chatterley's Lover" is an adaptation of the novel of the same name by D. H. Lawrence (R. 2). The Court below took judicial notice of Lawrence's talent as a writer (R. 52). Several of his novels, including "Lady Chatterley's Lover," are generally considered to be classics. The film is a faithful translation to the screen of the edition of the novel "Lady Chatterley's Lover," now freely sold throughout New York State (R. 2, 17).

The plot of "Lady Chatterley's Lover" concerns the relationship between Constance Chatterley, Sir Clifford Chatterley (her husband), and Oliver Mellors (their gamekeeper). Sir Clifford is crippled and impotent as the result of a war injury. He is the symbol of the rich and cynical industrialist, intent on the expansion of his coal mines, even at the cost of human life. Lady Chatterley is portrayed at the outset of the film as completely devoted to her husband. So that he may have an heir and in part to fill the emptiness of her life, Sir Clifford suggests that his wife have a child with some other man. Thereafter Lady Chatterley has an affair with the gamekeeper, Mellors. The gamekeeper is the foil for Sir Clifford. He is poor, as Sir Clifford is rich; simple and natural, as Sir Clifford is cynical and sophisticated; robust as Sir Clifford is crippled; and virile as Sir Clifford is impotent. Lady Chatterley, after learning that she is to have Mellors' child, attempts to secure her husband's consent to a divorce. When the divorce is refused she sacrifices wealth and social position

and, at the end of the picture, goes away to live with Mellors.

There is more to the picture than the incidents of the plot. It is a parable, a morality play in which the destructive forces of mechanization (represented by Sir Clifford) are pitted against what we shall call for want of a better term, the natural man, and in which the natural man finally triumphs. As Edmund Wilson wrote of the novel, "Lady Chatterley's Lover":

> "D. H. Lawrence's theme is a high one: the self-affirmation and the triumph of life in the teeth of all the sterilizing and demoralizing forces—industrialism, physical depletion, dissipation, careerism and cynicism—of modern English society; and the drama he has set in motion against the double and contrasting background of the collieries and the English forests has both solid reality and poetic grandeur." (The Shores of Light, pp. 404-405.)

The Motion Picture Division, after reviewing the picture, refused to license it for exhibition unless three isolated scenes were deleted. It found the sequences "immoral" (R. 10-11). In accordance with the New York moving picture censorship law (Education Law §124), the Distributor petitioned the Regents of the State of New York, for a review of that ruling. (The Department of Education and the Motion Picture Division are governed by the Regents of the State of New York, the appellees in this case.) The Distributor asked the Regents to reverse the Motion Picture Division on the grounds (in addition to the constitutional grounds) that the Division had acted inconsistently and arbitrarily and had erred in judging the film on the basis of a few isolated passages taken out of context. (R. 8, see *Roth* v. *United States*, 354 U. S. 476 at p. 489).

The Regents affirmed the Motion Picture Division's ruling and declared the *entire* picture immoral on the ground that the film presents "adultery as a desirable, acceptable and proper pattern of behavior." (R. 16)

The Regents' ruling was appealed to the Appellate Division of the Supreme Court of the State of New York for the Third Department. That court held that the denial of a license in this case was unconstitutional (R. 29). The Appellate Division found further that, "if any field of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration" (R. 29).

The Regents then appealed to the New York Court of Appeals. That court reversed the determination of the Appellate Division. Although four of the seven judges of the Court of Appeals voted for reversal, only three of them were of the opinion that the statutes are valid. (We shall hereafter refer to their opinion, written by Chief Judge Conway, as the "prevailing opinion".) Judge Desmond, who voted to sustain the Regents, did so to afford this Court an opportunity to pass upon the constitutional questions. "Our question," he wrote in his concurring opinion, "is whether New York State may constitutionally refuse exhibition to a film because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances. I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say." (R. 48)

Although it is not mentioned by the Regents, the symbolic drama of man's struggle against the evils of industrialization is too heavily underscored in the film,—as in the novel—to have been overlooked. As Mark Shorer wrote of "Lady Chatterley's Lover", "It is a novel in which

everything is symbolic, in which 'every bush burns' and which in itself finally forms one great symbol."[1] In the very first sequence of the moving picture one learns of the death of and injury to a number of miners at Sir Clifford's colliery. Then in a later scene at the mine one sees the bodies of injured workmen being carried from the pit. In another scene, great trees are uprooted and the land is torn up to prepare for new mine shafts. And it is not only because of the requirements of the plot that the industrialist is portrayed as impotent or unable to give life, and his protagonist, the natural man, is associated throughout the film with the nurturing of life.

To describe the film simply as the portrayal of adultery and as recommending it, is tantamount to describing the parable of the Prodigal Son as the tale of a young man who ran away from home, lived with harlots, and then returned to celebrate with his family.

Certainly the Regents—the governors of the Department of Education—could not have failed to comprehend the almost obtrusive symbolism of the film. They could not seriously have believed it was intended to encourage married women to run off with their gardeners. The Regents' objection to the film is based upon their lack of faith in the intelligence and character of the New York audience. It is based on the assumption that people who see the film will not have the intellect to understand the underlying intent, or the moral stamina to resist following the example of an adulterous relationship that is not explicitly condemned.

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[1] Shorer, On Lady Chatterley's Lover, Evergreen Review, vol. I, No. 1 (1957), p. 176.

POINT I

The New York film licensing laws impose a prior restraint on communication, prohibited by the First Amendment.

Precis

Motion pictures are a medium of expression and communication, and as such are entitled to the privileges, immunities and freedom guaranteed the press by the Constitution. The statutes under consideration provide for censorship and licensing of motion pictures prior to their distribution or "publication." The main purpose of the Constitutional Amendments prohibiting interference with the press is to prevent the imposing of such prior restraints.

We are not here concerned with punishment after distribution or exhibition, and it is not urged that exhibitors, distributors or producers of films should be free from responsibility for abuse of their constitutional rights. It is, on the contrary, urged that civil or criminal penalty for abuse is the appropriate remedy, and the only remedy consistent with the constitutional provisions guaranteeing liberty of the press.

The rationale of the prevailing opinion in the court below is that the power and influence of movies present a danger that can be met only by regulation prior to exhibition. The plain fact is that no such danger exists. There is no warrant for the exclusion of movies from the full protection of the Constitution.

For historical reasons, and because of differences in their effects, we distinguish between censorship laws designed to prevent publication, and those providing for punishment after publication. The statutes challenged here are the archetype of preventive censorship laws. They provide that a moving picture may not be shown in a public theater in New York until it is submitted to and approved by a board of examiners (Education Law §122, 129). If the examiners do not approve and license the picture, it may not be exhibited (Education Law §129).

The statutes thus impose a prior or previous restraint because they provide for government action or control *before* publication, i.e., before the moving picture may be shown to the public. The Constitutional guaranties of freedom of speech and press were designed primarily to bar any such prior restraint on communication. One of the first and most burdensome means of controlling the press in England was through the licensing of books by the Star Chamber (Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems, p. 659; Encyclopedia Britannica (1947), vol. 18, p. 454). And for a considerable period no book or paper could be printed in the American Colonies without the consent of or license by the Crown Governors. (Encyclopedia Britannica (1947), vol. 5, pp. 115-116). The first struggle for freedom of the press was, therefore, directed against the licensing system (William H. Wickwar, The Struggle for the Freedom of the Press, pages 14-15; William E. Hocking, Freedom of the Press, page 3, *et seq.*).

In *Lovell* v. *Griffin*, 303 U. S. 444, Mr. Chief Justice Hughes said, referring to an ordinance that required a

permit for the distribution of books and pamphlets (303 U. S. at pp. 451-452):

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson* v. *Colorado*, 205 U. S. 454, 462."[2]

Books, magazines, newspapers and other printed matter and plays have not been subject to license or the necessity of securing the imprimatur of a government official. *Superior Films* v. *Dept. of Education*, 346 U. S. 587, concurring opinion of Mr. Justice Douglas. In 1915 this Court held that moving pictures were subject to prior censorship, not because they presented a special problem justifying exception to the rule forbidding prior restraint upon the press, but principally because the Court then found that moving pictures were merely "spectacles, not to be regarded * * * as part of the press of the country or as organs

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[2] See also *Respublica* v. *Oswald*, 1 U. S. (1 Dall.) 318, decided 1788; *Commonwealth* v. *Blandford*, 3 Pick. (20 Mass.) 304, decided in 1825; and *Staub* v. *Baxley*, 355 U. S. 313, at p. 322, decided 1958.

of public opinion." *Mutual Film Corp.* v. *Ohio Industrial Comm.*, 236 U. S. 230, 244.[3]

The question of the constitutionality of motion picture licensing was considered by the Court again in 1952 in the case of *Burstyn* v. *Wilson*, 343 U. S. 495. That case involved a moving picture "The Miracle" banned under the New York film censorship laws on the ground that it was "sacrilegious." The Court held in the *Burstyn* case that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments," and it overruled the language to the contrary in the *Mutual Film* case. *Burstyn* v. *Wilson*, 343 U. S. at p. 502.

The statute involved in the *Burstyn* case is, with a minor exception not here relevant, the same as the one under consideration in this case. Because it was unnecessary to a determination of the *Burstyn* appeal, the Court did not strike down the entire film censorship law but ruled that the New York statute unconstitutionally restricted freedom of the press in permitting censorship of a movie on the basis of so vague a standard as "sacrilegious," 343 U. S. at pp. 505-506.

Mr. Justice Clark, writing for the Court in that case, said of the New York licensing law (343 U. S. pp. 503-504):

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures

[3] That was ten years before the Federal Constitutional guaranty of freedom of the press was held (in *Gitlow* v. *New York*, 268 U. S. 652, 666) to preclude interference by state action or legislation. As Mr. Justice Clark noted in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 at p. 502, note 12, it was 11 years before talking pictures were first produced.

sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. Near v. Minnesota ex rel. Olson, 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' *Id.*, at 716. In the light of the First Amendment's history and the Near decision, *the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.*" (Emphasis ours.)

The burden of demonstrating the necessity for licensing laws has not been sustained in this case, or for that matter, in any other. The mere apprehension of a danger does not justify limiting the right of communication. To justify restraint of expression there must be something more than a fear of harm to society. It must be shown that the danger is imminent and sufficiently grave to override society's interest in and need of free expression. *Marsh* v. *Alabama*, 326 U. S. 501, 508-509; *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Bridges* v. *California*, 314 U. S. 252, 262; *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96; *Schneider* v. *State*, 308 U. S. 147, 161-162; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Stromberg* v. *California*, 283 U. S. 359, 369. Mr. Justice Brandeis wrote in his dissent in *Whitney* v. *California*, 274 U. S. 357, 376: "Fear of serious injury alone cannot justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."

No evidence has yet been advanced to show that moving pictures present such clear and imminent danger of substantive evil, or present "such an exceptional case" as to justify the drastic controls imposed by the licensing statutes. The prevailing opinion below begs the question, citing the *Burstyn* case as authority. "The greater capacity for evil which inheres in motion pictures," the prevailing opinion states, "has been recognized by the highest Federal tribunal as 'relevant in determining the permissible scope of community control' (*Burstyn* v. *Wilson*, p. 502)." (R. 39)

The Court did not, in the *Burstyn* case, recognize that a greater capacity for evil inheres in motion pictures. Mr. Justice Clark, speaking for the Court did in fact say, at the cited page (343 U. S. at p. 502):

> "It is further *urged* that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it *may* be relevant in determining the permissible scope of community control, *but it does not authorize substantially unbridled censorship such as we have here.*" (Emphasis ours.)

The New York Court of Appeals had previously taken judicial notice of the fact that there is no objective evidence of the alleged evil impact or inherent evil of the movies.[4] In *Brown* v. *Kingsley Books* (1 N. Y. 2d 177), the Court noted (at p. 181, footnote 3):

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[4] In an article published in The New York Times, August 28, 1955, entitled "Censorship, Logic and the Law," Dr. Hugh Flick, then Chief of the New York motion picture censorship division, wrote:

> "Although much has been written on the impact of the mass media of communication and many claims are made concerning

"* * * studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e. g.*, Jahoda and Staff of Research Center for Human Relations, New York University (1954) The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)"

Dr. Jahoda's study when published indicated that as no group of the population is exposed to only one of the mass media, the effect or impact of any one, such as the movies, could not be determined. In the summation of the study, Dr. Jahoda wrote:

"There is a large overlap in content matter between all media of mass communication. The daily press, television, movies, radio and fictional printed material all present their share of the so-called 'bad' material, varying in the degree of reality attached to these matters. It is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of them. Some evidence suggests that the particular communications to which an individual exposes himself are probably in good part a matter of choice. The reader does not take in everything that is offered but mostly what he is predisposed to take. In the realm of attitudes, this means that adult

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the dangerous effects of motion pictures, comic books and television, there appears to be no single study that has as its objective the examination of impact of all the methods of communication.

If such a study could be undertaken * * *. *The conclusions would for the first time provide a basis upon which we could judge the wisdom or folly of state laws requiring the pre-release examination of motion pictures,* * * *." (Emphasis ours.)

people prefer to expose themselves to material which expresses attitudes they already hold * * *." The Impact of Literature: A Psychological Discussion of Some of the Assumptions in the Censorship Debate, p. 44.

Dr. Jahoda's study indicates that there is no factual basis for distinguishing between the kind of censorship permissible under the First Amendment for books, magazines and plays, and that constitutionally allowable for moving pictures.

Moreover, the conclusion that uncensored motion pictures present a danger to the public welfare and morality that can be met *only* by licensing (R. 40) does not seem warranted in view of the fact that only four states[5] and a few cities have motion picture licensing laws. The Court may take judicial notice that the people of the several thousand cities in the other forty-five states have not been unredeemably corrupted by uncensored films.[6] Even in states where only licensed movies may be exhibited in theaters, unlicensed films can be seen over television. *Allen B. Dumont Laboratories* v. *Carroll*, 184 Fed. 2d 153 (3rd cir.); Entertainment: Public Pressures and the Law, 71 Harvard L. R. 326, 334-335. It cannot, therefore, be urged that the licensing system is a necessary or an appropriate means of meeting the alleged danger presented by objectionable movies.[7]

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[5] Kansas, Maryland, New York and Virginia.

[6] Nimmer, the Constitutionality of Official Censorship of Motion Pictures, 25 University of Chicago L. R. 625, at p. 656

[7] The statutes, it should be noted, are not designed to prevent the showing of "out and out pornography". A person dealing in such films would not be likely to present them for license. Obscene moving pictures shown at "smokers" or private clubs are not affected by the statutes, which apply only to films shown in public theaters.

The prevailing opinion below suggests that the large audiences reached by motion pictures, and the "saturation techniques" employed by the motion picture industry in showing a moving picture in many theaters simultaneously, justify more stringent regulation of moving pictures than of other media of the press (R. 41). The argument assumes conditions that do not exist. A moving picture when initially released is generally exhibited at one, or at most a few, first-run theaters in the state. When the first-run is completed, it is shown in second-run theaters, then in third and fourth-run theaters, etc. (See *United States* v. *Paramount Pictures*, 334 U. S. 131, pp. 167 *et seq.*). An initial simultaneous showing of a film in any significant number of theaters would not be economically practicable.[8] It may be assumed that the penal laws will be enforced with reasonable speed during the first exhibition, to prevent injury to any large number of people from indecent or immoral movies. Many tabloids and picture magazines, on the other hand, are distributed simultaneously to millions of readers.[9] The harm that might be caused by the publication of immoral or obscene matter in periodicals[10] could not be seriously urged today as jus-

[8] There are about 1160 moving picture theaters in the State of New York (U. S. Bureau of the Census, 1954 Census of Business — New York, pp 32-5.) so that the total seating capacity of all the theaters would be approximately 450,000. The same film will not ordinarily be shown simultaneously in more than a small percentage of the total number of theaters.

[9] The New York Daily News has a circulation of 2,079,423 on weekdays and 3,480,905 on Sunday; The New York Daily Mirror has a daily circulation of 871,705 and a Sunday circulation of 1,308,100; The Readers Digest has a paid circulation of 11,508,322 (there are on an average several readers of each copy sold); and Life Magazine has a weekly circulation of 5,851,168 (also with several readers per copy). Directory of Newspapers and Periodicals, 1958, pp. 724, 720, 751 and 717; N. W. Ayers & Son.

[10] See The Commission on Freedom of the Press, A Free and Responsible Press, page 3.

tification for licensing them. As Mr. Chief Justice Hughes wrote in *Near* v. *Minnesota*, 283 U. S. 697, 720:

> "The fact that the liberty of the press may be abused * * * does not make any the less necessary the immunity of the press from previous restraint. * * * Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The rule applies with equal force to talking pictures.

The resistance to prior regulation of communications has more than an historical base. It exists primarily because such controls are broader, more stringent and more oppressive than a system of punishment after publication.

A licensing system, through the very fact of its existence, inhibits freedom of expression.[11] There is no right of speech or press if one must seek and obtain permission before he may express his ideas. "A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment. It subjects to government scrutiny and approval all expression in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual. The machinery is geared to universal inspection, not to scrutiny in particular cases which are the subject of complaint or otherwise come to the attention of prosecuting officials. The pall of government control is, thus, likely to hang more pervasively over the area of communication, and

[11] It has the corollary effect of curtailing the public's right to hear and assess varied ideas and expressions of opinion. Mr. Justice Rutledge, in a concurring opinion in *United States* v. *C.I.O.*, 335 U. S. 106, stated that the freedom of speech and assembly guaranteed by the First Amendment "involve the right to hear as well as to speak, and any restriction upon either attenuates both" at pp. 143-144. See also *Marsh* v. *Alabama*, 326 U. S. 501.

more issues are likely to be resolved against free expression." *Thomas Emerson*, The Doctrine of Prior Restraint, 20 Law & Contemporary Problems, pp. 656-657. See also *Winters* v. *New York*, 333 U. S. 507, 509-510; *Stromberg* v. *California*, 283 U. S. 359, 369.

Mr. Justice Murphy wrote in *Thornhill* v. *Alabama*, 310 U. S. 88, at pp. 97-98:

> "The power of the licensor * * * is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713 * * *. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

One of the most objectionable aspects of the licensing system is that the determination of whether a particular film offends the law is left generally to the discretion of the administrative official acting as censor. Where penal sanctions are imposed, the defendant and the communications are protected by the procedural safeguards of presumption of innocence,[12] by jury trial in many instances,[13]

[12] See also opinion of Chief Judge Learned Hand in *Kepner* v. *United States*, 195 F. 2d 152 (quoted at p. 33 of this brief) with respect to the affirmative burden of proof.

[13] Mr. Justice Brennan dissenting in *Kingsley Books* v. *Brown*, 354 U. S. 436, wrote at p. 448:

> "* * * The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average

and by right of full judicial review. There is, it is true, a right of review from the censor's decision, but it is of little value.[14] The question before the court on appeal is whether the censor acted arbitrarily; the burden of showing that the censor acted unreasonably rests upon the one who challenges the censor's decision (*Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, 185, 186, aff'd 354 U. S. 436; *Distinguished Films* v. *Stoddard*, 271 App. Div. (N. Y.) 715; *Commercial Pictures Corp.* v. *Regents*, 280 App. Div. 260, aff'd 305 N. Y. 336, rev'd on other grounds 346 U. S. 587.) and it is an almost impossible one to sustain. "Where licensing is vested in the first instance in an administrative agency, the available judicial review is in effect rendered inoperative." Mr. Justice Frankfurter concurring in *Burstyn* v. *Wilson*, 343 U. S. at 532. See also *Speiser* v. *Randall*, 357 U. S. 513, 520, 524.

Even an adequate right of review is of little avail where the communication deals with a current problem. Legal processes are slow. The film "Lady Chatterley's Lover," for example, was denied a license in May, 1956 (R. 10). The New York Court of Appeals did not render

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person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity fails short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene."

[14] The prevailing opinion below suggests that adequate judicial review of any refusal to license a film is always available "the courts of this State," the opinion states, "will always be alert to excesses and most quick to correct them, as indeed we were recently in the *Excelsior case*" (R. 41). The reference is to *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, in which the New York Court of Appeals overruled the Regents' refusal of a license. It was the first such action taken by the Court. Three of the seven Judges dissented and voted to sustain the ban of the film.

its decision respecting Appellant's right to show the film until two years later (R. 30). It is little satisfaction to those who would speak or publish and to those who wish to see and hear, that their rights may be vindicated in several years.

No tenable reason has been advanced for sustaining New York's film licensing law as an exception to the general constitutional prohibition against prior restraints of expression, and there are many cogent reasons for striking it down. The basic issue of whether the New York statutory licensing system is void as a prior restraint prohibited by the First and Fourteenth Amendments was raised in *Burstyn* v. *Wilson*, 343 U. S. 495. The Court then had before it a type of comprehensive legislation that it had not considered or passed on for 37 years. The Court in *Burstyn* therefore limited its decision to the necessities of the case, although it indicated hostility to censorship in advance of publication.

Since then[15] the issues have been fully presented, refined and considered. After the *Burstyn* case, this Court took jurisdiction of a number of other cases involving motion picture licensing laws. In a series of memorandum decisions the Court in effect held the following terms or standards too vague and indefinite to meet constitutional requirements when used in censorship statutes: "prejudicial to the best interests of the people" (*Gelling* v. *Texas*, 343 U. S. 960); "immoral" (*Commercial Pictures Corp.* v. *Regents*—decided with *Superior Films, Inc.* v. *Dept. of Education*, 346 U. S. 587); "harmful" (*Superior Films, Inc.* v. *Dept. of Education*, 346 U. S. 587); and "obscene or immoral or such as tend to debase or corrupt morals" (*Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870).

The State courts and lower Federal courts have variously interpreted the rulings of this Court in *Burstyn* and

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the later cases cited, to mean that prior censorship of motion pictures is unconstitutional, or that it is generally permissible, or that it is permissible only if such censorship is on the ground of obscenity. (See *Brattle Films, Inc.* v. *Com'r of Public Safety*, 333 Mass. 58; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Hallmark Productions, Inc.* v. *Carroll*, 384 Pa. 348; *Commercial Pictures Corp.* v. *Regents*, 305 N. Y. 336, rev'd 346 U. S. 587; *Superior Films* v. *Dept. of Education*, 159 *Ohio St.* 315, rev'd 346 U. S. 587; *Holmby Productions, Inc.* v. *Vaughn*, 177 Kan. 728, rev'd 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 244 Fed. 2d 432, rev'd 355 U. S. 35; and the 6 opinions in the instant case.) (R. 27-55) It is respectfully submitted that a determination of the basic question by this Court, will avoid further confusion and a multiplicity of further suits.

Also, since this attack is on a law purporting to license the dissemination of ideas, there is no policy requiring avoidance of the broad Constitutional question. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 and cases there cited; Avoidance of Constitutional Issues in Civil Rights Cases, 48 Columbia L R 427.

"Were we dealing with newspapers or books or with a stage play," Judge Fuld wrote in his dissenting opinion in the Court below, "there could be no question as to the unconstitutionality of the statute under consideration, and I perceive no basis for distinguishing between such forms of expression and a moving picture. The Constitution protects all expression and is limited neither by the thoughts put forth nor by the medium employed. It protects the transmission of ideas and beliefs, whether orthodox or unorthodox, popular or unpopular, and its protection extends alike to words uttered in the street, a public hall or a theatre (with actors live or on a screen) and to

words written in newspapers, books or motion picture subtitles. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the airborne voice, the printed word or the still picture, it is put forward by a moving picture with a sound track. The First Amendment does not inquire whether the medium is visual, acoustic, electronic or one yet to be devised, nor does it seek to know the speed of dissemination or the size of the audience. In short, the Amendment's meaning and vitality may not be conditioned upon the mechanism involved, and the differences existing between a book and a moving picture do not support a holding that the freedom of expression assured by the Constitution is inapplicable to the moving picture." (R. 53-54)

POINT II

Sections 122 and 122-a.1 of the New York Education Law contravene the First and Fourteenth Amendments to the United States Constitution in authorizing the suppression of opinion.

"Lady Chatterley's Lover" was banned as "immoral" under Education Law §§ 122 and 122-a.1 because the ideas presented were thought evil, not because of the manner in which the ideas were presented.[18] The film was denied a license because it allegedly presents adultery as acceptable or proper behavior. (R. 16, 33)

[18] Here is an attempt to equate "immorality" as used in the Sections 122 and 122-a.1 of the New York Education Law with "obscenity" cloaked outside the area of constitutionally protected speech in *Roth v. United States*, 354 U.S. 476. However, "Lady Chatterley's Lover" was not found obscene. As Judge Dye noted in his dissenting opinion below: "No one contends that the film in question is obscene within the narrow legal

Only three kinds of utterance have been held by this Court to be outside the area of Constitutionally protected expression. They are: libelous statements (*Beauharnais v. Illinois*, 343 U. S. 250); obscenity (*Roth v. United States*, 354 U. S. 476); and speech threatening violent destruction of the Government if such speech is coupled with a plan or conspiracy to carry it into effect (*Dennis v. United States*, 341 U. S. 494).

The statutes under consideration seek to extend the area of unprotected communication to speech challenging the moral order. The power of the State cannot be exercised to force the contents of movies, or of any communication into any ideological pattern. The script writer or movie maker is not required to produce moral tracts. He is not required to become a propagandist for the censor's principles. Whatever one's opinion may be with respect to the role of movie producer in society, the government cannot compel him to serve morality, or purge his work if it questions the moral assumptions of the community.[17]

It is not claimed that "Lady Chatterley's Lover" specifically incites the commission of adultery, but merely

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of obscenity as recently defined by the Supreme Court * * * The Regents have banned a showing of this film in its entirety because, in their opinion, its theme is *contra bonos mores*, and this in the face of the circumstance that the book on which it is based, has long been published and circulated freely without benefit of administrative censorship". (R. 51).

See also *Times Film Corporation v. City of Chicago*, 244 Fed. 2d 432, at p. 435, rev'd 355 U. S. 35, and *Winters v. New York*, 294 N. Y. 545, rev'd 333 U. S. 507, in which the courts attempted in the same manner to give precision to the term "immoral."

[17] "I am not an ordinary playwright in general practice. I am a specialist in immoral and heretical plays. My reputation has been gained by my persistent struggle to force the public to reconsider its morals. In particular I regard much current morality as to economic and sexual relations as disastrously wrong * * *" George Bernard Shaw—The Selected Prose of George Bernard Shaw, p. 375.

that by the presentation of a glamorous example through an effective medium, it may mislead the impressionable. The advocacy of a doctrine, no matter what mischief would result from its adoption, is within the protection of the Constitution. Even advocacy of the overthrow of the Government by force (when not accompanied by illegal incitement to action) may not be punished or restrained. *Yates* v. *United States*, 354 U. S. 298, 318, 322; *Speiser* v. *Randall*, 357 U. S. 513, 529 (concurring opinion of Mr. Justice Black); *United States* v. *Dennis*, 183 Fed. 2d 201, 207; *Dennis* v. *United States*, 341 U. S. 494, at pp. 512-513. It "cannot be the duty because it is not the right of the State to protect the public against false doctrine." *Thomas* v. *Collins*, 323 U. S. 516, p. 545, Mr. Justice Jackson concurring.

In *Reynolds* v. *United States*, 98 U. S. 145, Chief Justice Waite in sustaining the conviction of a Mormon for bigamy made it clear that the legislative power can punish *action* subversive of good order, but that it could not reach opinion. In discussing that principle, his opinion quotes the following, written by Thomas Jefferson:

> "'That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy * * *' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order'." 98 U. S. at p. 163[18]

Nor does the persuasive or "alluring" presentation of an opinion deprive one of the right to give it currency. If the protection of the Constitution is afforded only to uncon-

[18] See also, *Musser* v. *Utah*, 333 U. S. 95, 101-103 (Rutledge, J. dissenting).

vincing speech, the guaranty of freedom of expression would be of little value.

Section 122-a.1 of the New York Education Law is designed to protect children, morons and potential felons from evil influence, but it also affects and regulates the fare intended for normal adults. The stated purpose of the New York Legislature in enacting the section (which purports to give precise definition to the term 'immoral' as used in Section 122) was to protect "not * * * the mature and intelligent, with minds strengthened to withstand the influence of salacious presentations, but * * * the young and immature, the ignorant and the sensually and criminally inclined." (State Education Department Memorandum, New York State Legislative Annual, 1954, p. 37) A restriction of expression affecting all people, to ideas suitable for the immature, the ignorant and the sensually and criminally inclined is an unconstitutional curtailment of the right of communication (*Butler* v. *Michigan*, 352 U. S. 380; *Roth* v. *United States*, 354 U. S., at pp. 488-489).

POINT III

The statute under which "Lady Chatterley's Lover" was suppressed does not meet the constitutional requirements of a statute governing the press. The enforcement of the statute deprived appellant of its rights and property without due process of law.

The constitutional objection to a vague law regulating speech or press is that such law does not impose a standard upon those administering it. Since the law itself does not furnish any guide, its administrators are compelled to determine for themselves the boundaries of the law and the extent of their powers under it. There is no protection under such law against arbitrary interpretation and inter-

ference with the right of communication. Since each administrator determines the meaning of the statute for himself, the effect of the statute changes with the person of the administrator. In consequence there is in effect no regulation by law, but regulation in accordance with the convictions of the individual in authority. *Jordan* v. *DeGeorge*, 341 U. S. 223, 239, 240; *Musser* v. *Utah*, 333 U. S. 95, 97; *Winters* v. *New York*, 333 U. S. 507, 515, 518; Due Process Requirements of Definiteness in Statutes, 62 Harvard L. R. 77.

Where legislation permits or authorizes such personal control of so basic a civil right as the right to communicate and to receive communication freely, it is void on its face. The possibilities of abuse inherent in the statute render it void in its entirety. "It is settled" as Mr. Justice Reed said in *Winters* v. *New York*, 333 U. S. 507, 509,

> "that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment. *Stromberg* v. *People of the State of California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibitions against expressions protected by the principle of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

See also, *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Stromberg* v. *California*, 283 U. S. 359, 369; Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard L. R. 1208, 1209-1210. The deprivation of the right of communication pursuant to such void statute is without "due process of law." *Burstyn* v. *Wilson*, 343

U. S. 495, at p. 503 and p. 532 (concurring opinion of Mr. Justice Frankfurter); *Niemotko* v. *Maryland*, 340 U. S. 268, 271.

The relevant portions of Section 122 of the New York Education Law require the ban of films found "immoral or of such a character that its exhibition would tend to corrupt morals." In *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587 (decided under the caption *Superior Films, Inc.* v. *Dept. of Education of State of Ohio*), this Court considered the question of whether those terms as used in the statute under consideration are too indefinite to meet constitutional requirements. The memorandum opinion of the Court in that case indicates that the Court found the standard of "immorality" so vague and indefinite that the ban of a film on that ground was without "due process."[19]

The decision of the Supreme Court in the *Commercial Pictures Corp.* case (346 U. S. 587) was handed down January 18, 1954. In April, 1954, the New York legislature, to overcome the constitutional objections to the terms "immoral" and "of such character that its exhibitions would tend to corrupt morals", enacted Education Law §122-a.1 which purports to define and limit their application.

It is clear from a reading of Section 122-a.1 that the "definition" is no clearer or more precise than the term defined. Section 122-a.1 provides:

> "For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or

[19] See also *Holmby Productions Inc.* v. *Vaughn*, 350 U. S. 870 and *Times Film Corporation* v. *City of Chicago*, 244 Fed. 2d 432, 436, rev'd 355 U. S. 35.

> part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

The section is so loosely and poorly drawn, in the light of the prior decisions, that one is justified in concluding that the statute was not intended to clarify the law but to circumvent the ruling of this Court in the *Commercial Pictures Corp.* case, 346 U. S. 587. The terms "erotic", "pornographic", "lewdness", "proper patterns of behavior", etc. which purport to define the term "immoral" in Section 122-a of the Education Law do not purge the word "immoral" of ambiguity. They are merely terms of disapprobation. Their application to a given film is a denunciation, not an objective description of the content to be suppressed. The terms do not impose any standards limiting the exercise of the censor's discretion, nor do they furnish any guide to the motion picture producer, or distributor.

The Appellate Division of the Supreme Court of the State of New York, in holding Section 122-a.1 unconstitutional in this case, said (in the opinion delivered by Mr. Justice Coon):

> "Ordinarily such a word as 'immoral', which might have one meaning to one person or group of persons and another meaning to another person or group of persons, cannot be defined with such exactness or precision as would leave no field of individual opinion and discretion open to the viewer. Adding more adjectives or more words which are likewise open to different opinion helps little. * * *
>
> "For instance, under section 122-a, the censoring body must determine what 'the dominant purpose or effect' of a picture is, a matter upon which different

people or groups of people might disagree. The same is true as to what constitutes 'acts of sexual immorality, perversion, or lewdness.'

"As we interpret the decisions of the Supreme Court of the United States in the *Burstyn* case, the *Commercial Pictures* case, and *Holmby Productions* v. *Vaughn* (350 U. S. 870), a statute which leaves any field open to the opinion, discretion or individual point of view of a censor in banning a moving picture violates the Fourteenth Amendment. If any field of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration." (R. 28-29)

And Judge Dye wrote of Section 122-a.1 in his dissenting opinion in the court below:

"However well intentioned, the language as used still falls short of providing fundamental standards deemed essential for the guidance of administrative discretion. The added words are no more meaningful than the term 'sacrilegious', 'immoral', 'tend to incite to crime', 'prejudicial to the best interests', 'harmful and indecent', all found too general and unprecise to meet constitutional standards (*Joseph Burstyn, Inc.* v. *Wilson, supra; Matter of Commercial Pictures* v. *Board of Regents, supra; Winters* v. *New York*, 333 U. S. 507; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Education of Ohio;* 346 U. S. 587, *supra; Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Holmby Prods* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348). The term 'immoral' as used in section 122 has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term 'immoral' as a basis for prior restraint, he necessarily must resort to his own notion of its meaning since the statute itself provides no test or standards to guide him in the exercise of his discretion" (R. 50).

The New York Legislature in enacting Education Law §122-a.1 stated that its intent was to limit the meaning of the word immoral in the motion picture censorship law, so that it would apply only to *sexual immorality* (Governor's Message on Approving L. 1954 ch. 620. McKinney's Session Laws of New York, 1954, p. 1404).

However, the term "immoral" was limited in its application to "sexually immoral" acts when it was held unconstitutionally vague by this Court. The New York Court of Appeals, in *Commercial Pictures Corporation* v. *Regents*, 305 N. Y. 336, had previously ruled that the term "immoral" as used in Education Law §122 referred only to "sexual immorality." 305 N. Y. at pp. 345-346 (See also *Broadway Angels* v. *Wilson*, 282 App. Div. 643, and R 33-34). As Counsel for the Regents argued, in his brief to this Court in the *Commercial Pictures* case, the Supreme Court was bound by that construction in passing on the validity of the law. (See *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94) The Supreme Court in reversing the decision of the New York Court of Appeals, in the *Commercial Pictures* case, thus found the statutory standard of "*sexual immorality*" to be unconstitutionally vague and the New York Legislature, in enacting §122-a.1 did not further limit or define its meaning sufficiently at least to meet constitutional requirements.

In *Matter of Commercial Pictures Corp.* v. *Regents*, 305 N. Y. 336, the court, in construing section 122 of the Education Law, also held that the censor is required to apply the "moral standards of the community" rather than his own in determining whether a picture is "immoral." (305 N. Y., at p. 344.)[20] Presumably that was intended as a

[20] If one is to judge community standards by the conduct of the people rather than the attitudes they profess, it would appear that adultery is not so uncommon or repugnant to the community mores as the prevailing opinion below indicates. See Kinsey, Sexual Behavior of the Human Male, p. 585. See also *Schmidt* v. *United States*, 177 F. 2d, pp. 451-452.

limitation upon the censor's exercise of personal discretion. How one is to determine community attitudes generally, or with respect to a particular film that has not been exhibited publicly, is not made clear.

There is, of course, no available method for learning the community's attitude (if there is a general attitude), on questions of sexual morality. Where a statute requires one to judge in accordance with the moral sentiments of the people of a State, the person administering the law must either guess what people generally feel or substitute his own judgment. *United States ex rel. Iorio* v. *Day*, 34 F. 2d 920, 921; *Repouille* v. *United States*, 165 F. 2d 162; *Schmidt* v. *United States*, 177 F. 2d 450; Cahn, Authority and Responsibility, 51 Columbia L. R. 838.

In *Repouille* v. *United States*, 165 F. 2d 152, Chief Judge Learned Hand wrote (p. 153):

> "Very recently we had to pass upon the phrase 'good moral character' in the Nationality Act; and we said that it set as a test * * * whether it conformed to 'the generally accepted moral conventions current at the time.' In the absence of some national inquisition, like a Gallup poll, that is indeed a difficult test to apply; often questions will arise to which the answer is not ascertainable, and where the petitioner must fail only because he has the affirmative. * * * Many people—probably most people—do not make it a final ethical test of conduct that it shall not violate law; few of us exact of ourselves or of others the unflinching obedience of a Socrates."

And Judge Desmond of the New York Court of Appeals, in voting to sustain the validity of §122-a.1 in this case, said:

> "*I confess my own inability to determine* whether or not an average person, applying to 'Lady Chatterley's Lover' the *undiscoverable* standards of a hypothetical community, would consider that the dominant theme of the whole film appealed principally to prurient interest or to artistic sensibilities or to a mature and adult interest in one of the lively arts." (R. 46, emphasis ours.)

In *Schmidt* v. *United States* (177 Fed. 2d 450) the court passed upon the application for citizenship of an unmarried man who engaged in "casual, concupiscent and promiscuous, but not adulterous" sexual intercourse. In determining that the applicant was of good moral character, the court said (again per Chief Judge Hand) (177 Fed. 2d, p. 451):

> "In Petitions of Rudder et al. * * * each of several aliens had been living for years with a single woman in an adulterous union, which apparently had not been concupiscent. Either the alien or the woman had been unable, for one reason or another, to get a divorce. We admitted them all because we did not 'believe that the present sentiment of the community views as morally reprehensible such faithful and long continued relationships under the circumstances here disclosed.' In United States v. Rubia (5th Cir., 110 F. 2d 92) the alien was admitted upon substantially the same facts, save that he had had a good war record."
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> * * *
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> "* * * In two very recent cases the Third Circuit by an equally divided court of all six judges, affirmed orders admitting two aliens (as persons of "good moral character") in the following circumstances. In the first case, an unmarried man admitted that he had had occasional meretricious relations with a single woman for pay; in the second case, the facts were the same, except that the alien had a wife and children in

Italy, from whom he had apparently not been legally separated." [21]

The test of vagueness in a statute is that " men of common intelligence must necessarily guess at its meaning and differ as to its application * * *" *Winters* v. *New York*, 333 U. S. 507, 517-518. The instant case furnishes an excellent illustration of the vagueness of the term "immoral" as defined by Section 122-a.1. The examiners of The Motion Pictures Division found that only three isolated sequences (of a few moments' duration) were immoral (R. 10-11). Their superiors, the Appellees, found the entire picture immoral. Of the 12 New York State judges who saw the film (5 of the Appellate Division and 7 of the New York Court of Appeals), only three ruled that the film is immoral.

Section 122-a, although it purported to clarify and limit the meaning of the terms "immoral" and "tend to corrupt morals", in the censorship law, made no legally recognizable change in their meaning, or in the scope of the law. The determination of this Court that the word immoral as used in Education Law §122 is unconstitutionally vague (in *Commercial Pictures Corp.* v. *Regents*, decided *sub nom. Superior Films* v. *Dept. of Education*, 346 U. S. 587), applies with equal, if not greater, force to the definition of the term in Education Law §122-a.1.

[21] In *Musser* v. *Utah*, 333 U. S. 95, Mr. Justice Jackson's comment on the statutory phrase "injurious to public morals" was that it "led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing" (333 U. S., at p. 97).

See also Petition of R 56 F. Supp. 969; Petition of Lieberman, 50 F. Supp. 121.

POINT IV

The suppression of the film "Lady Chatterley's Lover" was arbitrary and unwarranted.

Even if the laws here challenged are held constitutional and the suppression of "immoral" opinion is countenanced, the decision sustaining the ban of the picture "Lady Chatterley's Lover" should be reversed because the film is "not of the character that the first amendment permits a State to exclude from public view." *Burstyn* v. *Wilson*, 343 U. S. 495, at pp. 506-7. (Concurring opinion of Mr. Justice Reed.)

The censorship of a "particular writing or other tangible form of expression * * * raises an individual constitutional problem in which the reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards". (Mr. Justice Harlan concurring and dissenting in *Roth* v. *United States*, 354 U. S. at p. 497.)

The reason advanced for the refusal to license "Lady Chatterley's Lover" is that it glorifies adultery[22] and presents it as socially acceptable behavior. (R. 16) The adulterous relationship between Lady Chatterley and Mellors

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[22] It is of interest that the adjective most frequently used to describe Lawrence's atitude towards sexual morality is "puritanical". Professor Mark Shorer speaks of D. H. Lawrence as "perhaps the only important Puritan in his generation" (On Lady Chatterley's Lover, Evergreen Review, Vol. I No. 1 (1957) p. 176). Earl H. Brewster said of Lawrence, "He was a Puritan—a term I often heard applied to him in his presence." (Edward Nehls, D. H. Lawrence, A Composite Biography, Vol. III (1959) p. 135) and Father William Tiverton, an Anglican priest wrote "all his friends have testified to the puritan in Lawrence." Tiverton, D. H. Lawrence and Human Existence (1951) p. 77. "Lawrence the Puritan", Sigrid Undset, The Achievement of D. H. Lawrence, p. 58 "Lawrence was in many instances a puritan". F. Hoffman, *Id.*, p. 112.

is merely subsidiary to or part of the major theme of the story. The dominant theme is the destructive impact of industrialization on personality and on life.

> "Lady Chatterley's Lover, like everything that Lawrence wrote, is an affirmation of life values as against the mechanization of human nature. This, his general subject matter, may be broken down into two major themes; the relation of men and women, and the relation of men and machines. In the works as they are written, the two are one, and his most subtle and penetrating perception, the knowledge that social and psychological conflicts are identical, is so firmly integrated in the structure of his books that it is almost foolhardy to speak of his having two themes when in fact he had one vision". Shorer, On Lady Chatterley's Lover, Evergreen Review, Vol. I, No. 1, pp. 161-162.[23]

The Regents totally ignored that aspect of the film and they failed or refused to consider other factors that have an important bearing on the question of whether the film may be suppressed. The Answer made by the New York censorship board to the initial petition in this proceeding states that the allegations with respect to the "artistry, good taste and purpose of the * * * film are irrelevant". (R. 14). Such considerations are not irrelevant, and we believe the film reflects the high artistic integrity and fine craftsmanship of its maker and author. A play or a moving picture may not be judged, even by Government authority, solely upon the basis of the orthodoxy of its doctrine. Excellence of workmanship, seriousness and sincerity of purpose and aesthetic values may invest the work with social importance which the constitution protects. *Roth* v. *U. S.* 354 U. S. 476 at p. 498.

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[23] See also discussion at pp. 7-9 of this brief.

"The established reputation of the work and the estimation of approved critics" is still another factor that must be considered in determing whether the public must be protected against a motion picture.[24] (*U. S.* v. *One Book entitled Ulysses*, 72 F. 2d 705, 708)

We believe the affirmative values of the film far outweigh the considerations that impelled the censor to suppress it and that the possibility of harm resulting from the showing of the picture is not sufficiently grave to justify the limitation on the freedom of the press implicit in preventing its exhibition.

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[24] "'Lady Chatterley's Lover' is not only a work of serious purpose but also a work of high achievement. Whether it is as great a novel as some critics thought when it was first published is arguable. The characters are sometimes symbols rather than human beings and the propaganda purpose occasionally shows through." Archibald MacLeish, letter preface to "Lady Chatterley's Lover," Grove Press (1959).

"It ("Lady Chatterley's Lover") is the most inspiriting book from England that I have seen in a long time; and—in spite of Lawrence's occasional repetitiousness and his sometimes rather overdone slapdash tone—one of the best written." Edmund Wilson: "Lady Chatterley's Lover", in The Shores of Light, p. 405. (Matter in parenthesis ours.)

"Much of what is happening in Europe today (1938) and yet more that will doubtless happen in the future are the brutal reactions of mass humanity to the problems which the exceptional man, the genius D. H. Lawrence, perceived and faced and fought against in his own way: in his writings, a great part of which in any case will pass into the heritage which our age will hand on to future generations." Sigrid Undset in, The Achievement of D. H. Lawrence, by Hoffman and Moore, p. 62.

"He was a clever man, as well as a man of genius." Aldous Huxley, *Id.*, p. 69.

"I live in hopes that Lawrence's recognition is at last to come—to come after all in my life-time: I mean, his recognition for what I am convinced he is: the great creative genius of our age, and one of the greatest figures in English literature." F. R. Leavis: Scrutiny, Vol. XVIII, p. 66.

Conclusion

1. Sections 122, 122-a, 126, 129 and 131 of the Education Law of the State of New York should be declared void on the ground that they set up a system of licensing and prior restraint of communication prohibited by the First and Fourteenth Amendments.

2. If the foregoing relief is not granted, Sections 122 and 122-a.1 of the New York Education Law should be held void to the extent that they permit the suppression of a motion picture on the ground that it is immoral or of such character that its exhibition would tend to corrupt morals.

3. If both the foregoing requests for relief are denied, the order of the New York Court of Appeals in this case should be reversed on the ground that there was no justification or warrant for the ban of the moving picture "Lady Chatterley's Lover".

Respectfully submitted,

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APPENDIX

The Statutes Involved

Education Law—Article 3

PART II—MOTION PICTURE DIVISION

§120. Motion picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees. McKinney's Consolidated Laws of New York. Book 16, Part 1, page 23.

§122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to

corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 24.

§122-a. Definitions

1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. McKinney's Consolidated Laws of New York, Book 16, Part 1, 1958 Cumulative Annual Pocket Part, page 11.

§123. Permits

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly

called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

§[1] 2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit. McKinney's Consolidated Laws of New York. Book 16, Part 1, pages 27-28.

§124. Review by regents

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined

by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act[1] at the instance of the applicant. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 29.

§125. Permits revocable

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 31.

§126. Fees

The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 32.

§129. Unlawful use or exhibition

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 33.

§130. Posters, banners, et cetera

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 34.

§131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 34.

§132. Enforcement; rules and regulations

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 35.